

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002194-MR

PHILIP E. KNEE

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 08-CR-00015

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal of the Appellant's conviction for one count of Manslaughter II. The Appellant, Phillip Knee, was sentenced to ten years of imprisonment for this crime. He now brings an appeal asserting that his conviction should be reversed due to errors made by the trial court. For the reasons that follow, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Knee was convicted of Manslaughter II for the death of the infant child of his girlfriend, Janice Cotton. On February 4, 2008, emergency services were called to the home of Cotton's mother in Princeton, Kentucky. Knee and Cotton were visiting her mother during the incident. Testimony at trial indicated that the infant, Ethan, never had a pulse from the time the first emergency medical technician arrived on the scene until the time he was later pronounced dead at the hospital.

Knee was charged with the crime after a police interview during which Knee stated that he had given Ethan a bottle to stop him from crying. Ethan was suffering from nasal congestion and could not breathe through his nose. Knee stated that he pressed the bottle into Ethan's mouth even though Ethan tried to move his mouth in order to breathe. When Ethan stopped crying, Knee stated that he thought he might be dead, but that he could feel a faint heartbeat. Knee then went outside the house to take a call and it was later that Cotton and her mother noticed Ethan was not breathing.

At trial, the first arriving emergency personnel, Chris Pool, testified that when he arrived at the scene, the infant was not breathing. Dr. Luke Ross testified that he was Ethan's treating physician when he arrived at the emergency room. He stated that baby formula was aspirated from his lungs after Ethan was intubated. It was Dr. Ross's opinion that Ethan had been dead for at least a couple

of hours prior to his admission to the emergency room because his core body temperature was 95.4 degrees.

The Commonwealth admitted into evidence a tape of Knee's interrogation by the police. During the interrogation, Knee admitted to holding the child and forcing his bottle into his mouth. One aspect of Knee's defense was that his taped confession to the police was coerced because he had been intimidated by the officers. That interview was recorded and the recording had been sanitized by agreement to remove all references to Knee's prior bad acts. Knee asked that the sanitized tape of his interrogation be played to the jury. He also asked that any reference he made to prior involvement in criminal activity on the tape be redacted. The Commonwealth argued that the statements made about Knee's prior criminal activity should be used to rebut Knee's defense and contention about intimidation. The trial court held that it would be too difficult to redact the information at that point and that Knee could either choose to leave out the interrogation or have it played in its entirety. Knee's counsel objected to specific portions of the tape but chose to have the interrogation tape played, and now argues that the trial court erred in refusing to play a redacted version.

STANDARD OF REVIEW

In reviewing alleged errors involving evidentiary rulings by the trial court, we use the abuse of discretion standard of review. *Tumey v. Richardson*,

437 S.W.2d 201, 205 (Ky. 1969). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Com. v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With this standard in mind, we will examine Knee’s appeal.

DISCUSSION

The trial judge admonished the jury prior to playing the interrogation tape. He stated:

Ladies and gentlemen, the Commonwealth is going to play the tape of that interview at this time, and during it you may hear references to other actions, or other conduct by the defendant, that is not to be considered in any way as indicative of his guilt of the crime that he is charged with here. It will be for your consideration only, if at all, only for this purpose and that is to show what his state of mind may have been during the period of time of the interview.

(Trial Record at 9:11:30.) After the admonition, the interrogation tape was played.

Knee testified that he was intimidated by the officers during his interrogation and that he was not free to leave the interrogation room. Knee also testified that he only “confessed” after the police officers told him what they wanted him to say. He stated that he was confused and felt stressed by the officers and their questioning. Knee now argues that the trial court erred in admitting evidence of his prior charged acts pursuant to Kentucky Rules of Evidence (KRE) 404(b).

In determining whether evidence of prior acts may be admitted under KRE 404(b), the court must determine whether the evidence is relevant, whether it is probative, and whether or not it is too prejudicial. *Bell v. Com.*, 875 S.W.2d 882

(Ky. 1994). In this case, the Commonwealth did not move to introduce the evidence of prior acts, but argued that Knee's position (that he was intimidated and coerced during the police interrogation) could not be presented to the jury without the playing of the full interrogation tape. We agree.

Knee stated on the interrogation tape that he was nervous around police officers because he had been in trouble with law enforcement before and that, consequently, he was generally intimidated by them. The information of prior acts was not being introduced by the Commonwealth to prove Knee's criminal disposition. Further, there was other sufficient evidence to support the conviction. Thus, we find that the trial court did not err in allowing in the entire interrogation tape.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Joshua D. Farley
Assistant Attorney General
Frankfort, Kentucky